UNITED
NATIONS

E

Economic and Social
Council

Distr.
GENERAL

E/C.12/1996/SR.48
26 March 1997

ENGLISH
Original: FRENCH

PROPERTY OF
COLLECTION

COMMITTEE ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Fifteenth session

SUMMARY RECORD OF THE 48TH MEETING

Held at the Palais des Nations, Geneva,
on Monday, 2 December 1996, at 3 p.m.

Chairperson: Mr. ALSTON

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GE.96-19399 (E)

The meeting was called to order at 3.15 p.m.

SUBSTANTIVE ISSUES ARISING IN THE IMPLEMENTATION OF THE INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (agenda item 3) (continued)

1. The CHAIRPERSON said that he was intending to transmit a file of letters concerning various countries to the members of the Committee, and in particular a letter from Mr. Muterahejuru, written on the anniversary of his imprisonment two years previously. Unfortunately, the letter contained nothing new either in relation to progress on his case or with reference to Rwanda in general. However, the support and interest expressed by his colleagues on the Committee were of great comfort to him.

Draft optional protocol to the Covenant (continued) (E/C.12/1996/CRP.2/Add.1)

2. The CHAIRPERSON, summing up the debate of the previous meeting, noted that two diverging opinions had emerged on the subject of the protocol; the majority opinion was in favour of a procedure of strict application to all the rights set out in the Covenant, while the minority opinion favoured a more flexible approach. In order to reconcile the two positions, Mr. Simma had proposed that the protocol should be strictly implemented as a matter of principle, but that each State party should have the option, when it ratified it, to declare that it would exclude a particular provision from the scope of the protocol.

3. Mr. MARCHAN ROMERO said that while Mr. Simma's proposal was a constructive attempt to reach a consensus, in practice it might well allow States parties to make exclusions in the light of their own situations in order to disregard a specific right set out in the Covenant. He himself was in favour of the universal implementation of all rights, which were indivisible, and he hoped that the Committee would arrive at a consensus.

4. Mr. SIMMA said that, while he too was in favour of implementing all rights without exception, his proposal was aimed at a consensus to enable the Committee to progress in its work. The Committee could insert a self-evident but pertinent note to the effect that States could naturally, at any time, revoke the exclusion of any article from the scope of the protocol. The advantage of inserting a clause to give States that possibility should enable them to arrive at results they were capable of obtaining and also to give their own interpretation of the rights to be safeguarded in the form of interpretative statements.

5. Mr. TEXIER said he was unable to support a proposal whereby the Committee itself opened the way to excluding rights which it was its mission to safeguard. By taking an initiative which he considered to be ill-conceived the Committee would allow itself to be caught up in a situation in which, whatever form the protocol took, it was never likely to be adopted and would remain in limbo.

6. Mr. ADEKUOYE said that, although he was convinced in principle of the indivisible nature of the rights safeguarded by the Covenants, he had the impression that while the Committee acknowledged that the provisions of the Covenant under discussion were difficult to implement and gave States advice

on how to ensure their application as far as possible, as in the case of its draft general observation on national application of the Covenant, it was trying to achieve recognition of the enforceability of the rights set out in it by the back door.

7. Practice should take precedence over ideology. Ensuring full enjoyment of the rights set out in the Covenant required resources which many States did not have or no longer had. According to the Covenant itself, the full exercise of those rights must be ensured progressively, depending on the resources of the country concerned.

8. Mr. GRISSA declared that he resolutely opposed the protocol, which was unrealistic since certain countries, even among the most prosperous, could not implement all the provisions of the Covenant in full. For example, the United States had shown greater realism in not signing the Covenant, knowing that it could not implement it. He asked that the principle of the protocol should be put to the vote since he wished to express his opposition to it.

9. The CHAIRPERSON recalled that Mr. Grissa had been present when the Committee had decided precisely not to take a vote on the subject. It was not the Committee's mission to be a Solomon; it comprised a group of specialists whose role was to promote respect for economic, social and cultural rights, which, true to the spirit of the Covenant, the Committee expected to achieve gradually.

10. The implementation of all covenants, treaties and conventions came up against the same difficulty and the same shortcomings on the part of the States parties. He only needed to cite a single example, that of the Convention against Torture, which was nowhere implemented in full. It was precisely the Committee's mission constantly to remind the States parties of their duties.

11. Mrs. BONOAN DANDAN said that all individuals possessed human rights just because they were human beings. States had no option but to undertake to safeguard and develop those rights. She asked that members of the Committee should put aside their emotions and passions and apply themselves to putting the protocol into shape.

12. She could not support the notion of giving a State party the opportunity to exclude any single one of the rights contained in the Covenant from the scope of the protocol. The Committee's task was to ensure that the States parties remained on the right road, with no "ifs" or "buts", if it was not to risk becoming the victim of its own complacency.

13. Mr. TEXIER expressed surprise that Mr. Grissa, who considered that the Committee was wasting its time and that the United States had been right not to sign the Covenant, should have agreed to sit on the Committee at all.

14. It would be unreasonable to wait until all States parties were implementing the Covenant to the full before thinking of drafting a protocol. Perfection was in the mind, but that did not prevent the Committee, when it considered a country report, from taking account of the country's situation

with discernment but without complacency; there were certain shortcomings, such as the refusal of trade union rights, which could not be excused on the grounds of poverty.

15. Mr. RATTRAY reminded members that States which had ratified the Covenant were required to respect and promote the rights it recognized and that, to date, the Committee had devoted its efforts to bringing the States parties to accept that it should be possible to establish certain of those rights in their courts. The drafting of an optional protocol was a further step towards establishing an international court to which individuals could apply. Since the Covenant itself stated that the full realization of economic, social and cultural rights could only be achieved progressively by the States parties, in terms of the resources available to them, the creation of such a court would have to be achieved gradually. That was all the more true in that the opinions expressed by the Committee during a procedure for consideration of communications would not be enforceable.

16. The Committee therefore needed to be aware of the true situation and not lose sight of the fact that it had a mission to accomplish. If it adopted a maximalist approach, it was quite simply likely to find that the States parties would refuse to sign the optional protocol. For reasons of strategy, it would therefore be better to encourage the States parties to sign the optional protocol by giving them the opportunity to select those articles of the Covenant for which they were prepared to accept a communications procedure.

17. The CHAIRPERSON said that the only solution was to inform the Commission of the divergence of opinions expressed. The comments accompanying the draft protocol could indicate that the majority of the Committee's members were in favour of a comprehensive approach, while a substantial minority would prefer the optional protocol to contain a provision allowing States parties to exclude certain rights from or include them in its scope.

18. The Chairperson's proposal was adopted.

19. The CHAIRPERSON drew the attention of the members of the Committee to paragraphs 34-36 of the revised version of the report he had submitted concerning the draft optional protocol (E/C.12/1996/CRP.2/Add.1) and asked if the protocol should include a transitional provision which would come into force if the Economic and Social Council were to decide to abolish the Committee.

20. Mr. WIMER ZAMBRANO asked whether it was wise for the Committee to envisage its own abolition just when it was endeavouring to bring a new instrument into being. At a time of financial crisis in the United Nations, it could be hazardous to mention any such possibility.

21. Mr. SIMMA, supported by Mr. TEXIER, expressed the opinion that the Committee should include that very complex issue in the comments accompanying the draft protocol and not in the text of the draft itself, to show that it was aware of the problem.

22. Mrs. JIMENEZ BUTRAGUEÑO, supported by Mr. ADEKUOYE and Mr. AHMED, said she would prefer the Committee not to express any view on the matter, either in the text of the draft protocol or in the accompanying comments.

23. The CHAIRPERSON drew the attention of the members of the Committee to the fact that, in drafting the Secretary-General's report on the follow-up and monitoring of the International Covenant on Economic, Social and Cultural Rights (E/1996/101), the Legal Counsel had included a sentence which had appeared in a previous report by the Chairperson of the Committee and had attributed it to the Committee as a whole, when he stated that "The Committee clearly indicated its preoccupation with its ambiguous status with respect to the Covenant." Rightly or wrongly, the sentence appeared in an official Economic and Social Council document and bore witness to the fact that the Committee was aware of the problem.

24. In any case, it was his understanding that the majority of the members of the Committee wished to remove any mention of the question from the text of the draft protocol and from the accompanying comments.

25. It was so decided.

26. The CHAIRPERSON drew the attention of the members of the Committee to article 2 of the draft optional protocol concerning the right to submit a communication (E/C.12/1996/CRP.2/Add.1, paras. 39 and 40). The Committee should reconsider paragraph 1 of the article once it had agreed on wording for the intervention of a third party, but could already be considering the text proposed for paragraph 2.

27. Mr. RATTRAY expressed the view that the first part of paragraph 2 in which States parties to the Protocol undertook "not to hinder in any way the effective exercise of the right to submit a communication" was unnecessary. It was obvious that a State signing the Protocol would by definition undertake not to hinder the exercise of the right to submit a communication. He therefore proposed the deletion of the phrase but said that he would not object to leaving it in if the majority of the members of the Committee were in favour of so doing.

28. Mr. SIMMA said that paragraph 2 was far from superfluous. Experience had shown that States did sometimes seek to hinder the exercise of rights which were set out in the international instruments to which they were parties.

29. Mr. MARCHAN ROMERO said he thought that the word "victimization" in the English version was inappropriate. In the Spanish version, he proposed that the words "que se castigue a la persona" should be replaced by "que se tomen represalías contra la persona," so that the reference should be to reprisals rather than to sanctions.

30. Mr. SIMMA said he shared that opinion but would prefer "countermeasures" to "reprisals".

31. Mrs. JIMENEZ BUTRAGUEÑO expressed preference for the existing wording.

32. Mr. KOUZNETSOV proposed that "prosecution" should be used instead.

33. Mr. WIMER ZAMBRANO said he felt that the second part of paragraph 2, beginning with the words "or the victimization ...", was too detailed or even superfluous, since earlier in the same paragraph States parties "undertake ... to take all steps necessary to prevent any interference with the exercise of this right" to submit a communication. However, he would not insist on the deletion of the second part of the paragraph if the majority of members preferred to leave it. He would, however, prefer a different wording.

34. The CHAIRPERSON, noting that the members of the Committee were in agreement on the substantive aspects, proposed that Mr. Wimer Zambrano and Mr. Marchan Romero should amend the wording of paragraph 2 in the light of the various suggestions made and then submit the new version they had prepared to the Committee.

35. It was so decided.

36. The CHAIRPERSON, drawing the attention of the members of the Committee to the proposed text of article 3 (E/C.12/1996/CRP.2/Add.1, paras. 41 and 42), said that the various rules of procedure concerning admissibility contained therein were based directly on the terms used in the first Optional Protocol to the International Covenant on Civil and Political Rights. Paragraph 2 specified that "The Committee shall declare a communication inadmissible if it: ... constitutes an abuse of the right to submit a communication". The purpose of that provision was to allow the Committee to reject outright communications which it considered to be trivial, obscene or unnecessary, or which obviously constituted delaying tactics.

37. Mr. WIMER ZAMBRANO proposed replacing the word "queja" in the Spanish version of paragraph 41 by "demanda", which he thought was more appropriate.

38. In article 3.1, the verb "concerns" was too general and was liable to reduce considerably the Committee's room for manoeuvre and, for example, to prevent it from holding a State which was not a party to the Protocol responsible for violations committed in another State which was a party to the Protocol. That would be the case, for example, if a State which was not a party to the Protocol violated the economic, social and cultural rights of a State party which it had occupied illegally. In the Spanish version, the verb "afecte" (concerns) should thus be replaced by "esté en contra de" (is directed at).

39. The CHAIRPERSON proposed that "concerns" should be replaced by "is directed at".

40. The Chairperson's proposal was adopted.

41. Mr. MARCHAN ROMERO commented that in paragraph 2 (c) (i) the expression "constitute a continuing violation of the Covenant" suggested that the Committee would not consider violations which could not be so described.

42. The CHAIRPERSON, supported by Mr. RATTRAY, proposed that the subparagraph should read:

"(i) continue to constitute a violation of the Covenant after the entry into force of the Optional Protocol;".

43. The Chairperson's proposal was adopted.

44. The CHAIRPERSON put before the Committee a proposed amendment to the beginning of paragraph 3, to read:

"The Committee shall not declare a communication admissible if it has been ascertained:

(a) that all available domestic remedies have not been exhausted;".

According to the author of the proposal, it was for the State party in question to prove that all domestic remedies had not been exhausted rather than for the Committee to demonstrate that they had been exhausted.

45. Mr. RATTRAY pointed out that the proposed wording would differ from that of article 5 of the first Optional Protocol to the International Covenant on Civil and Political Rights and that the Human Rights Committee had in practice interpreted the article in question in the sense intended by the author of the proposed amendment.

46. The CHAIRPERSON agreed and suggested that the text should be left as it stood.

47. Mr. KOUZNETSOV drew the Committee's attention to the difference between article 5.2 (b) of the first Optional Protocol to the International Covenant on Civil and Political Rights and article 3.3 (a) of the draft optional protocol under consideration. The first of those texts provided that the Human Rights Committee would not consider any communication from an individual unless it had ascertained that he had exhausted all available domestic remedies but that that should not be the rule where the application of the remedies was unreasonably prolonged. However, the second text stated that the Committee on Economic, Social and Cultural Rights would not declare a communication admissible without first ascertaining that all available domestic remedies had been exhausted, unless it considered that the application of that requirement would be unreasonable. He wondered in what sense the latter text, with its broader coverage, would be more suited to the draft protocol.

48. The CHAIRPERSON explained that the text under consideration was based on an analysis made by Mr. Nowak, who had prepared comments on the draft protocol for the meeting of experts organized by the Netherlands Institute of Human Rights in Utrecht, in January 1995. The wording in question took into account the interpretation which the Human Rights Committee tended to give to the pertinent provision. Like nearly all international bodies, the Human Rights Committee no longer insisted on the complete exhaustion of all domestic

remedies, which amounted to having recourse to the Supreme Court or even Parliament, which could postpone indefinitely the adoption of a law to allow an application by an individual.

49. Mr. KOUZNETSOV supported that point of view.

50. Mr. RATTRAY said that, where civil and political rights were concerned, some domestic remedies were not available in practice, for example, in the case of indigenous persons who were not in a position to bring an action.

51. Mr. SIMMA said that he could not imagine how it could be unreasonable to exhaust all available remedies. Paragraph 3 (a) could be amended to "that the exhaustion of all domestic remedies would be unreasonable". Another solution would be to delete the second half of the subparagraph from "unless the Committee considers ...".

52. The CHAIRPERSON agreed to the latter proposal.

53. The proposal to delete the phrase "unless the Committee considers that the application of this requirement would be unreasonable" was adopted.

54. Mr. SIMMA, referring to paragraph 3 (b), said that the Committee could only decide about the phrase "by or on behalf of the author" once it had taken a decision on the wording "Any individual or group claiming to be a victim of a violation ... may submit a written communication to the Committee for examination" in article 2.

55. The CHAIRPERSON invited the members of the Committee to consider the text proposed for article 4 (paras. 43 and 44).

56. Mr. TEXIER said that the phrase "after being given a reasonable opportunity to do so" was too vague and that a specific deadline should be established for substantiating the allegations.

57. The CHAIRPERSON pointed out that, for example, a six-month deadline would be too short for the author of a communication living in a remote region and excessive for someone with access to modern means of communication. The deadline should therefore be left to the Committee's discretion.

58. Mr. TEXIER said that he thought the matter could be dealt with in the rules of procedure.

59. Mrs. JIMENEZ BUTRAGUEÑO said that in the Spanish version the expression "oportunidad razonable" was not specific enough, and should be replaced by "plazo razonable".

60. Mr. MARCHAN ROMERO said with reference to paragraph 2 that the circumstances in which the Committee might recommence examination of a communication should be specified.

61. The CHAIRPERSON agreed and proposed the addition of "At the request of the author of the complaint" at the beginning of the paragraph.

62. The Chairperson's proposal was adopted.

63. Mrs. JIMENEZ BUTRAGUEÑO suggested the addition of the phrase "in accordance with its rules of procedure" at the end of the paragraph.

64. The CHAIRPERSON agreed that the importance of the rules of procedure should be stressed, but said that it seemed unnecessary in the present case. The rules of procedure could be mentioned in the commentary which would accompany the text of the draft article.

65. Mrs JIMENEZ BUTRAGUEÑO agreed.

66. The CHAIRPERSON invited the members of the Committee to consider the text proposed for article 5.

67. Mr. RATTRAY said that the concept of interim measures was inherently delicate. Such measures were intended to protect by preserving the status quo of rights which might be impaired. There was, however, a difference between the interim measures taken by the State party, which would be enforceable, and the conclusions of the Committee, which were not binding. It was legitimate to ask a State party to take interim measures to avoid irreparable harm but not necessarily to preserve the status quo.

68. The CHAIRPERSON suggested, in view of that comment, that paragraph 2 should be deleted.

69. Mr. WIMER ZAMBRANO said he considered that paragraph 1 should be reworded. Preserving the status quo in the event of forced deportation would be tantamount to preventing persons affected by the measure from going home. It should therefore be specified that the status quo meant a return to the situation obtaining prior to the violation of the right.

70. Mr. AHMED said he shared the views of Mr. Rattray and Mr. Wimer Zambrano. It was unfair for the Committee to ask the State party in question to take interim measures before it had reached a conclusion on the merits of a communication. The paragraph furthermore contradicted one of the points contained in the analysis of the protocol which the Committee had submitted to the World Conference on Human Rights, whereby under the procedure brought into force in the context of an optional protocol, the final decision on the measures to be taken to follow up the Committee's observations devolved on the State party concerned. He could not therefore accept the paragraph as it stood.

71. Mr. SIMMA expressed the view that paragraph 2 should be kept. In cases in which irreparable harm might occur, the Committee should be in a position to ask the State party concerned to take all necessary measures to prevent it, even if the Committee's conclusion concerning the merits of the communication was not enforceable.

72. The CHAIRPERSON, referring to Mr. Ahmed's comment, said he considered that paragraph 1 was appropriate since it did not impose a legally binding obligation.

73. Mr. SIMMA expressed the opinion that there were situations in which a State party should be required to suspend action that might result in the violation of the rights of an individual. In a concern to arrive at a consensus, he proposed that the words "to preserve the status quo" should be deleted from paragraph 1.

74. Mr. AHMED also proposed the deletion of the phrase "and before a determination on the merits has been reached", since the Committee should not take a decision on the merits of a communication before the State had been able to take action. The present wording favoured the authors of the communication to the detriment of the State party. He therefore suggested the following wording: "At any time after the receipt of a communication, the Committee may request the State party concerned to provide all necessary information on the case being discussed."

75. The CHAIRPERSON said that most legal systems contained a procedure which jurists in common law countries termed "injunctive relief", which was on a par with interim measures. The aim of the proposed wording was to permit the Committee, following the receipt of a communication which, for example, reported measures that might endanger the lives of a million persons, to ask the State party concerned to suspend that action in order to allow it the time to consider the situation in detail. The verb "request" could be replaced by "appeal to".

76. Mr. AHMED suggested that "and before a determination ..." should be replaced by "and after a determination on the merits has been reached".

77. The CHAIRPERSON pointed out that the measures in question could not then be interim measures since the Committee would already have reached a determination.

78. Mr. SIMMA suggested replacing "and before a determination ..." by a less ambiguous expression.

79. The CHAIRPERSON asked Mr. Ahmed and Mr. Simma to work out a mutually agreeable solution on that point.

The meeting rose at 6 p.m.